MAR 9 1984

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, NINETEEN HUNDRED AND EIGHTY-THREE

STATE OF FLORIDA,

Petitioner,

-v-

ARTHUR HAYES BURWICK,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Florida

BRIEF OF RESPONDENT IN OPPOSITION

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PUBLIC DEFENDER

P. DOUGLAS BRINKMEYER
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QUESTION PRESENTED

WHETHER THE EXERCISE OF A DEFENDANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT AND TO HAVE THE ASSISTANCE OF COUNSEL PURSUANT TO MIRANDA V. ARIZONA, 384 U.S. 436 (1966), CLOSELY CONNECTED IN TIME TO THE OFFENSE, BEARS A SUFFICIENT RELATIONSHIP TO THE ISSUE OF SANITY AT THE TIME OF THE OFFENSE TO OVERCOME ANY NEGATIVE INFERENCES WHICH MIGHT BE DRAWN BY A JURY AND PERMIT THE ADMISSION OF THE DEFENDANT'S ELECTION ON REBUTTAL TO REFUTE AN INSANITY DEFENSE.

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PRELIMINARY STATEMENT

References to Petitioner's Brief on Jurisdiction will be by use of the following abbreviation: Pet.Br.- followed by the appropriate page number. References to Petitioner's Appendix will be by use of the following: Pet.App.- followed by the appropriate page number.

OPINIONS BELOW

Petitioner's allegations designating the opinions below are correct.

JURISDICTION

Petitioner's jurisdictional allegations are accepted.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts the constitutional and statutory provisions involved as set forth by petitioner (Pet.Br.3-4).

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by petitioner (Pet.Br. 5-12), with the addition that the opinion of the Florida Supreme Court is based on state, as well as federal, constitutional provisions.

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to review and reverse the opinion of the Florida Supreme Court in State v. Burwick, __So.2d__ (Fla. 1983) 1983 FLW 480, as an erroneous interpretation of this Court's previous decisions regarding the admissibility of evidence at trial which reflects that the defendant requested an attorney and remained silent following his arrest and receipt of the warnings enunciated in Miranda v. Arizona, 384 U.S. 436 (1966). Petitioner contends that the facts of this case present an exception to the general ban on the admission of such evidence similar in nature to those created

by this Court in United States v. Havens, 446 U.S. 620 (1980) and Harris v. New York, 401 U.S. 222 (1971). Petitioner completely overlooks the fact that Havens and Harris simply did not concern the use of post-arrest silence, but rather dealt with the use of post-arrest statements obtained in violation of Miranda to impeach a defendant who gave inconsistent statements on the stand at trial. This Court held that the Miranda rule of exclusion of illegally obtained statements could not be "perverted into a license to use perjury by way of a defense." Harris, 401 U.S. at 226. This significant difference between the use of post-arrest, post-Miranda statements, and the use of post-arrest, post-Miranda silence belies petitioner's assertion that the opinion of the Florida Supreme Court is in conflict with this Court's prior decisions.

The fact that Burwick's state of mind was placed in issue by his insanity defense does not obviate the fact that post-arrest, post-Miranda silence is so ambiguous that its probative value on any issue has been rejected, as a matter of law, by this Court. In United States v. Hale, 422 U.S. 171 (1975), this Court held that post-arrest silence is inherently ambiguous because such conduct may constitute either a tacit admission of guilt or a lawful assertion of a Fifth or Sixth Amendment right. In so holding, this Court stated:

> At the time of arrest and during custodial interrogation, innocent and guilty alike - perhaps particularly the innocent - may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. See Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U.Chi.L.Rev. 657, 676 (1966). He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention.
>
> Hale, 422 U.S. at 177 (footnote omitted).

The Florida Supreme Court, in Burwick, reiterated this logic as follows:

> Contrary to what Greenfield [337 So.2d 1321 (Fla. 2d DCA 1976)] intimates, these ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue. The same evidentiary problems addressed by the Supreme Court in Hale are present in the case before us. For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a Miranda warning and thereafter choose to remain silent. In sum, just what induces post arrest, post-Miranda silence remains as much a mystery today as it did at the time of the Hale decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt.
>
> Pet.App.-14-15.

Similarly, in Doyle v. Ohio, 426 U.S. 610 (1976), this Court, as in Hale, held that references to a defendant's post-arrest, post-Miranda silence may not be made in rebuttal of a defense of alibi. There, this Court held that the use of such evidence is a violation of due process:

> While it is true that the Miranda warnings constitute no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.
>
> Doyle, 426 U.S. at 618.

Recently, this Court reaffirmed its Hale and Doyle pronouncements. In Fletcher v. Weir, 455 U.S. 603 (1982), this Court held that evidence of post-arrest silence could be used to rebut a defense of self defense where the silence was not preceded by the giving of Miranda warnings. This Court stated:

> In the absence of the sort of affirmative assurance embodied in the Miranda warnings, we do not believe that it violates due process of law for a state to permit cross examination as to post arrest silence when a defendant chooses to take the stand.
>
> Fletcher, 455 U.S. at 607.

This Court also outlined its recent rulings on the subject in support of the holding:

> In Jenkins v. Anderson, 447 U.S. 231, 239 (1980), a case dealing with pre-arrest silence, we said:
>
> > "Common law traditionally has allowed witnesses to be impeached by their previous failure to state of fact and circumstances in which the fact naturally would have been asserted. 3 A J. Wigmore, Evidence, Section 1042, P.1056 (Chadbourn Rev. 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative."
>
> In Jenkins, as in other post-Doyle cases, we have consistently explained Doyle as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him. In Roberts v. United States, 445 U.S. 552, 561 (1980), we observed that the post conviction, presentencing silence of the defendant did not resemble "post-arrest silence that may be induced by the assurances contained in Miranda warnings." In Jenkins, we noted that the failure to speak involved in that case occurred before the defendant was taken into custody and was given his Miranda warnings, commenting that no governmental action induced the defendant to remain silent before his arrest. 447 U.S. at 239-240. Finally, in Anderson v. Charles, 447 U.S. 404, 407-408 (1980), we explained that use of silence for impeachment was fundamentally unfair in Doyle because "Miranda warnings inform a person of his right to remain silent and assure him, at least implicitly that his silence would not be used against him.... Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.
>
> Fletcher, 455 U.S. at 606.

Thus, it is clear that this Court bans the use of post-arrest, post-Miranda silence because such silence is inherently ambiguous and susceptible of no fair inference, and because it is induced by the warnings containing the implicit assurance that the silence will not be used against the defendant at trial. Although it is true that this Court has created an exception to this rule when a defendant takes the stand and testifies in a manner contradicted by illegally obtained statements, there is no basis for petitioner's argument that government induced silence is relevant

in rebuttal of an insanity defense, when this Court has held it inadmissible in rebuttal of other affirmative defenses.

As the Fifth Circuit Court of Appeals has stated in United States v. Henderson, 565 F.2d 900 (5th Cir. 1978), the Fifth Amendment "is not an if-but-or sometimes partial privilege, it is a complete and absolute right." Henderson, 565 F.2d at 903. It is in recognition of the "aura of guilt [which] is popularly associated with an accused's exercise of the right to remain silent" that the courts have adhered to the principle first enunciated in Miranda. Henderson, 565 F.2d at 905. Historically, the Florida Supreme Court has also strictly protected the right to remain silent established in the state and federal constitutions. The decision of the Florida Supreme Court in Burwick is an application of principles previously pronounced as a matter of state law. In the opinion, the court cites to its previous opinions in Clark v. State, 363 So.2d 331 (Fla. 1978), and Bennett v. State, 316 So.2d 41 (Fla. 1975) (Pet.App.-11). These cases, as well as many others not cited by the court, hold that any reference in the jury's presence to the defendant's assertion of the right to decline to answer police questioning is reversible error where properly preserved. See, Simpson v. State, 418 So.2d 984 (Fla. 1982); Willensky v. State, 360 So.2d 760 (Fla. 1978); Shannon v. State, 335 So.2d 5 (Fla. 1976); Simmons v. State, 139 Fla. 645, 190 So. 756 (Fla. 1939).

By adhering to its own prior pronouncements, the Florida Supreme Court has not erroneously departed from this Court's interpretation of the Fifth Amendment to the United States Constitution, as argued above. However, should this Court consider the Burwick ruling to be a substantial departure from its prior pronouncements on the use of post-arrest, post-Miranda silence at trial, respondent contends that the opinion is a valid exercise of the Florida Supreme Court's prerogative to interpret the state constitution in a more restrictive manner than this Court interprets the federal constitution. See,

Manson v. Brathwaite, 432 U.S. 98 (1977) (Marshall, J.,dissenting); Oregon v. Mathiason, 429 U.S. 492 (1977) (Marshall, J., dissenting). The Florida Supreme Court held in Burwick that the state constitutional due process clause is violated by "permit[ting] the state to benefit from the fruits of its own deceptions" which arise when its agents "lure [the defendant] into remaining silent" and later "impeach the man with this very same silence." (Pet.App.-16). Thus, the opinion of the Florida Supreme Court, as an interpretation of Article I, Section 9 of the Florida Constitution (Pet.Br.-4) and a resolution of conflict within the state appellate courts on the state constitutional issue, is a valid exercise of state court jurisdiction on an independent and adequate state ground. Consequently, certiorari review would be inappropriate. See, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

CONCLUSION

Based on the foregoing arguments and authorities, this Court should decline to exercise its discretionary jurisdiction because the opinion of the Florida Supreme Court is not in conflict with the prior pronouncements of this Court on the question presented, and it is a valid interpretation of state constitutional provisions decided on independent and adequate state grounds.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Ms. Carolyn Snurkowski, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128-1789, this 2 day of March, 1984.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

NO. 83-1316

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Supreme Court, U.S.
FILED
MAR 9 1984
ALEXANDER L. STEVAS
CLERK

STATE OF FLORIDA,

Petitioner,

vs.

ARTHUR HAYES BURWICK,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

ARTHUR HAYES BURWICK, respondent in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit of insolvency has been sent to respondent, who is in custody, with directions to execute it immediately, and send it to this Court. The affidavit sets forth the fact that respondent is indigent and unable to pay or give security for the fee and costs attendant to this proceeding.

2. Respondent was adjudged insolvent in the Circuit Court of Duval County, Florida, and had court appointed counsel; and he was again adjudged insolvent for appellate purposes to the First District Court of Appeal and Supreme Court of the State of Florida, and was represented there by appointed counsel.

WHEREFORE, upon receipt of respondent's affidavit, it is respectfully requested that respondent be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
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Second Judicial Circuit
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(904) 488-2458

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Arthur Hayes Burwick, c/o Duval County Jail, Post Office Box 779, Jacksonville, Florida, 32202, Honorable Sid White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and to Ms. Carolyn Snurkowski, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128-1789, this 7 day of March, 1984.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER